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THIS is the first of a series of articles, written by professors in the Harvard Law School, in which it is intended to point out the most notable decisions, books, articles, and statutes during the past year which affect or explain the law in the topic under discussion. These articles are not intended to be collections of all authorities on the subject, but simply of such authorities, coming under the notice of the author, as seem to him to mark some progress in the law. The next paper in the series will appear in the December number.

THE CONFLICT OF LAWS

THE NATURE, ORIGIN, AND EXTENT OF LAW

I. An interesting decision throwing light upon the origin of law is *Panama Railroad Co.* v. *Bosse.*[1] This was an action brought in the District Court of the Canal Zone, and eventually brought by appeal to the Supreme Court of the United States. The question of law involved was whether under the law of the Canal Zone in 1916 a master was liable for his servant's negligent tort. A presidential proclamation in 1904 kept in force "the laws of the land, with which the inhabitants are familiar," until altered or annulled by the Commission. In 1912, by presidential proclamation, all the lands within the limits of the Canal Zone were declared necessary for the construction and operation of the canal, and in 1916 there were no inhabitants except employees of the company and persons licensed to do business there.

[1] 249 U. S. 41, 39 Sup. Ct. Rep. 211 (1919).

The court held, on these facts, that while the Civil Code of Colombia was in force in the Zone, the interpretation of it must be governed by common-law principles; following decisions to that effect in the Zone, beginning with *Kung Ching Chong* v. *Wing Chong*.[2] Mr. Justice Holmes observed that

"it is not necessary to dwell upon the drift toward the common-law doctrine noticeable in some civil-law jurisdictions at least, or to consider how far we should go if the language of the Civil Code were clearer than it is. It is enough that the language is not necessarily inconsistent with the common-law rule."

The court here is bowing to the inevitable. The experience of the Zone is that of New York, where the earlier Dutch law was overwhelmed by the English invasion; of Louisiana, where the French law gave way before an American settlement; and of California, New Mexico, and Texas, where the Spanish law yielded. Nothing but a considerable and continuing body of inhabitants, as in Quebec and in South Africa, has been able to maintain an older system of law against a large immigration of English or Americans. The Code may remain; the vaster body of unwritten law tends almost irresistibly toward the common law.

II. Whose law is administered in the consular courts in the "Treaty Ports" of China or any country of "the Capitulations," so called? This question has exercised the English and American courts for many years. In *Tootal's Trusts*,[3] Chitty, J., said (or was supposed to have said — as a matter of fact his expressed opinion was quite the opposite), that not Chinese but English law applied to an Englishman doing business in Shanghai. This view was expressed neatly and tersely by Warrington, L. J., in *Casdagli* v. *Casdagli*, in the Court of Appeal:[4]

"I am of opinion that the Consular Court in Egypt is one of the King's Courts, that its jurisdiction is derived from the King and not from the ruler of Egypt, and that the law administered therein is strictly the law of England, and is not to be regarded as a branch of the law of Egypt."

The opposite view has been vigorously expressed in America by Judge Spear in *Mather* v. *Cunningham*:[5]

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[2] 2 Can. Zone Sup. Ct. 25, 30 (1910).
[3] 23 Ch. D. 532 (1883).
[4] [1918] P. 89, 103.
[5] 105 Me. 326, 338, 74 Atl 809 (1909).

"Whatever laws may have been extended by Congress to the Province of Shanghai are operative, not upon American soil, but upon the territory of the Chinese Empire. How do these laws reach there? By treaty, permission of the Emperor. . . . The source of the law was the Emperor."

The same view had been expressed by Professor Huberich in an article in the LAW QUARTERLY REVIEW.[6] This view was taken, in the Court of Appeal in the case of *Casdagli* v. *Casdagli*,[7] by Scrutton, L. J., in his dissenting opinion:

"Can it make any difference whether the sovereign of the domicil administers the law directly or allows another sovereign by grant to exercise part of his sovereignty by administering such law as he pleases in Courts which the sovereign of the domicil allows to exist in his territory? The law appears to be still the law of the domicil."

The House of Lords has now adopted the view of the American courts and of the Lord Justice Scrutton.[8] The view of the court was expressed most neatly by Lord Finlay, L. C.:

"In Egypt it is part of the law of the governing community or supreme power, — in other words, it is part of the law of Egypt that English residents are governed by English law."

The acceptance by the House of Lords of the doctrine that the law administered in the consular courts is so administered because it is part of the territorial law of the sovereign, means its universal acceptance. Thus a source of difficulty in establishing the domicil of persons residing in the treaty ports is removed.

DOMICIL

I. The case of *Casdagli* v. *Casdagli*,[9] just cited on another point, is equally important as settling a disputed question in the law of domicil. English courts for more than a century had been almost denying the possibility of an Englishman becoming domiciled in China, Egypt, or any country of so different a civilization. In *Maltass* v. *Maltass*[10] Dr. Lushington evidently doubted the possibility of a British subject becoming domiciled in Turkey, though

[6] 24 L. QUART. REV. 440, 444.
[7] [1918] P. 89, 110.
[8] Casdagli *v.* Casdagli, [1919] A. C. 145.
[9] *Ibid.*
[10] 1 Rob. Eccl. 67 (1844).

subjects of other European countries have been found to have a domicil in Constantinople.[11] In *Tootal's Trusts*,[12] Chitty, J., said that "every presumption" was against an Englishman acquiring a domicil in Shanghai. He was also of opinion that a Chinese domicil in Shanghai carried with it the imposition of the native Chinese law as the domiciliary law: that there is no such thing as an "Anglo-Chinese" domicil. This doctrine was approved by the Privy Council in *Abd-ul-Nessih* v. *Farra*,[13] where the country in question was Egypt. Meanwhile the American courts had been taking the opposite view; finding domicil in a treaty port on the same evidence that would have fixed a domicil anywhere. Judge Wilfley in the American Consular Court for China found an American to have died domiciled in Shanghai,[14] disapproving *Tootal's Trusts*. This decision was followed by the Supreme Judicial Court of Maine in *Mather* v. *Cunningham*,[15] and is now adopted by the House of Lords.

The doctrine has been the subject of much comment. Professor Huberich's article has already been referred to. The decision of the Court of Appeal in *Casdagli* v. *Casdagli* was adversely criticized by Professor Dickinson in a judicious article in the MICHIGAN LAW REVIEW.[16] The decision of the House of Lords has met with much comment, favorable in general,[17] but in at least one case rather adverse.[18]

II. Three decisions during the past year have involved the right of an emancipated minor to acquire a new domicil. In *Delaware, L. & W. R. R.* v. *Petrowsky* [19] the plaintiff's father lived in Pennsylvania, where the plaintiff was employed in a mine; the plaintiff having been injured in the mine, the father said to him, "I cannot support you any longer, so you can go wherever you like." The plaintiff then went to live in New York, and brought this action in the federal court as a citizen of that state. The court held that

[11] Nugent *v.* Vetzera, L. R. 2 Eq. 704 (1866).
[12] 23 Ch. D. 532 (1883).
[13] 13 A. C. 431 (1888).
[14] *In re* Allen, 1 AM. J. INT. L. 1029.
[15] 105 Me. 326, 74 Atl. 809 (1909).
[16] 17 MICH. L. REV. 437.
[17] 32 HARV. L. REV. 432; 17 MICH. L. REV. 694; 28 YALE L. J. 810.
[18] 19 COL. L. REV. 243.
[19] 250 Fed. 554 (1918).

an emancipated son cannot as such acquire a new domicil.[20] In *Gulf C. & S. F. Ry.* v. *Lemons*[21] the plaintiff minor's father "had given him permission to go and make a living for himself," and he went elsewhere and joined with his brother in carrying on business. This court also held that an emancipated child could not acquire a domicil of choice for himself.

On the other hand, another federal court in *Bjornquist* v. *Boston & A. R. R.*[22] took the opposite view of the power of an emancipated minor. The plaintiff, while his father was domiciled in Massachusetts, was injured, as was alleged, by the fault of the defendant. His parents died, and he went to live with his aunt in Maine; he then, still a minor, brought suit in the federal court in Maine as a citizen of that state. The court held that the doctrine of natural guardianship[23] had never been extended to the case of an aunt, but that the circumstances were tantamount to an emancipation, and that an emancipated infant who has attained years of discretion may acquire a new domicil for himself.[24]

These decisions must have the unfortunate effect of confusing the law, which had previously seemed clear upon the point. The decisions had heretofore been unanimous to the effect that an emancipated infant may change his domicil, if he has arrived at years of discretion.[25] In view of this authority, it may be hoped that the two decisions first cited will not be followed.

Taxation

During the year under discussion the author has already published two articles on the subject: "The Jurisdiction to Tax,"[26] and "The Situs of Things."[27]

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[20] See this case commented on in 4 Cornell L. Quart. 62.

[21] 206 S. W. (Texas) 75 (1918).

[22] 250 Fed. 929 (1918).

[23] See Lamar *v.* Micou, 114 U. S. 218, 5 Sup. Ct. Rep. 857 (1885).

[24] See this case commented on, 32 Harv. L. Rev. 175.

[25] Woolridge *v.* McKenna, 8 Fed. 650 (1881) (*semble*); Lewis *v.* Missouri, K. & T. Ry., 82 Kan. 351, 108 Pac. 95 (1910); Lubec *v.* Eastport, 3 Me. 220 (1824) (though under a later statute he cannot acquire a pauper settlement while a minor: Thomaston *v.* Greenbush, 106 Me. 242, 76 Atl. 690 (1909)); Russell *v.* State, 62 Neb. 512, 87 N. W. 344 (1901); Sherburne *v.* Hartland, 37 Vt. 528 (1865); South Burlington *v.* Cambridge, 77 Vt. 289, 59 Atl. 1013 (1905) (*semble*); Rex *v.* Everton, 1 East, 526 (1801).

[26] 32 Harv. L. Rev. 587.

[27] 28 Yale L. J. 525.

I. The nature of a tax, as a revenue duty to the crown rather than an ordinary debt, has been squarely brought in issue during the year, and the proper conclusion drawn, — that the state which imposes a tax cannot bring suit in another state to recover the amount of it.[28]

II. The taxation of interstate rolling stock of railroads or car companies has always been a matter of difficulty. Early attempts to tax all cars which happened to be within the state on taxing day failed, because each car so taxed in transit was only temporarily within the state and therefore not subject to taxation.[29] But the device of taxing some average number of cars, or taxing the cars employed within the state during the year at some fair valuation, soon grew up, and was finally upheld by the Supreme Court of the United States in the case of *Pullman's Car Co.* v. *Pennsylvania*.[30] There the fair valuation was reached by taxing that proportion of the value of all property of the company employed in its business which the mileage of the cars within the state bore to the whole mileage. This method of taxing a fair proportion of the property of such a corporation, based on a reasonable proportion, has been universally followed.

This method was employed by Georgia to estimate that proper proportion of total valuation of the cars of the Union Tank Line which was subject to assessment in Georgia. It was found that the mileage used in Georgia formed between two and three per cent of the total mileage, and that proportion of the total value of the cars, which came to about two hundred and ninety-one thousand dollars, was assessed. The company claimed that the average number of cars at all times within the state was fifty-seven, valued at about forty-seven thousand dollars. The Supreme Court of the United States held the assessment illegal, on the ground that the appraisal was made "according to an arbitrary method which produced results wholly unreasonable," and that it therefore would deprive the company of property without due process of law.[31] Justices Pitney, Brandeis, and Clarke dissented. In reaching their

[28] Colorado *v.* Harbeck, 106 N. Y. Misc. 319, 175 N. Y. Supp. 685 (1919).

[29] Pacific R. R. *v.* Cass County, 53 Mo. 17 (1873). See Hays *v.* Pacific M. S. S. Co., 17 How. (U. S.) 596 (1854).

[30] 141 U. S. 18, 11 Sup. Ct. Rep. 876 (1891).

[31] Union Tank Line *v.* Wright, 39 Sup. Ct. Rep. 276 (1919).

result, the court overruled what they were pleased to call a *dictum* in the Pullman case, in which the court approved as reasonable the method of taxation there adopted.

It is a serious thing to overthrow a method of taxation approved for so many years by the courts, and to establish a new theory as law. The view of the majority in this case appeared to be that no statutory method of assessing the tax could be valid unless it led to a valuation of property at pretty nearly what the court regarded as its true value. The rule adopted here, the court said, had no necessary relation to the true value. This is certainly too strong a statement. The alternative method suggested, that of taking the average number of cars within the state at their value, has two objections: the assessors would be absolutely dependent for their facts upon the company to be assessed, as the minority point out, since the keeping of records of the cars by the railroad is the only practicable method of finding this average; and that important element of value, the use of the cars as part of a going concern, would be omitted. To assess according to proportion of car mileage would be perhaps the fairest method, but it would be open to the former objection.

It is clear that in a case of this sort the court does not put itself in the place of the assessors, and place its own value upon the property; it has to declare only whether the method of assessment prescribed by statute was a reasonable one. It is submitted that in view of the certainty, publicity, and simplicity of this method, and of its having been approved by the court in 1891 and practiced for twenty-eight years, the court might in 1919 have found it still reasonable.

The result of the case is, apparently, that in assessing the local value of property passing between the states the local authorities will be restricted to the one method which yields a theoretically exact result.[32]

III. In the case of a trustee of intangible personal property, the situs of the property is held to be the domicil of the trustee.[33] The case of a guardian is different; for the ward, not the guardian, is

[32] Comments on this decision may be found in 19 COL. L. REV. 334; 28 YALE L. J. 802.

[33] Lowry *v.* Los Angeles, 27 Cal. App. 307, 175 Pac. 702 (1918); Davis *v.* Macy, 124 Mass. 193 (1878); Matter of Newcomb, 71 App. Div. 606, 76 N. Y. Supp. 222 (1902); affd. 172 N. Y. 608, 64 N. E. 1123 (1902); 32 HARV. L. REV. 619.

owner of the property. Decisions are conflicting as to whether the property shall be taxed at the domicil of the guardian, the domicil of the ward, or the place of appointment.[34] Since a guardian of the property may be appointed in every state where tangible property is found, it should be clear that such property continues taxable in its own state; but intangible personal property, which is ordinarily taxable only at the domicil of the owner, would seem to be properly taxable at the ward's domicil.

In *Taylor* v. *Commonwealth*[35] promissory notes belonging to a ward were taxed as intangible property at his domicil, though the guardian was a nonresident of the state. This was put upon the ground that the notes were intangible; but it is clear that promissory notes are now regarded as tangible for the purpose of taxation.[36] In this case the notes were as a matter of fact held at the ward's domicil, being in the hands of the guardian's attorney at that place. The decision is therefore entirely in accordance with the general principles of taxation.

IV. The right of a state to levy an income tax is not yet settled by authority, and any decision upon the point is therefore of interest. In *Shaffer* v. *Howard*[37] such a tax was levied in Oklahoma on income from an oil-well there situated, received by the owner of the lease in Illinois.[38] In *Maguire* v. *Tax Commissioner*[39] it was held that Massachusetts might tax income received by a resident from securities held in trust for her by a Pennsylvania trustee and not taxable in that state. The state statute expressly exempted income from property which had been taxed elsewhere. In *Williams* v. *Singer*[40] England was not allowed to tax the income from foreign securities held by English trustees, where the income was paid directly to the foreign beneficiaries, not going through the hands of the trustees. On the other hand, where the securities were in the hands of a local agent, who collected the income and forwarded it to the foreign owner, the Supreme Court of the United States allowed the tax.[41]

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[34] 32 HARV. L. REV. 622.

[35] 98 S. E. (Va.) 5 (1919).

[36] Austin *v.* Great Southern L. I. Co. 211 S. W. (Texas Civ. App.) 482 (1919).

[37] 250 Fed. 873 (1918).

[38] Comment on this case in 32 HARV. L. REV. 168.

[39] 230 Mass. 503, 120 N. E. 162 (1918).

[40] [1918] 2 K. B. 749.

[41] De Ganay *v.* Lederer, 39 Sup. Ct. Rep. 524 (1919).

JURISDICTION OF COURTS

I. A British vessel and a Norwegian vessel collided in an Algerian harbor, and the master of the British vessel brought action in the Algerian court for damages, and obtained, according to the French law there prevailing, a "protective seizure." The action was not *in rem;* the seizure was like an attachment, and was dissolved upon giving a bond. The Norwegian vessel having come into a Maine port, it was libeled by the owner of the English vessel in the District Court. The court held that the pendency of the French action did not affect its jurisdiction, and that the "general maritime law of the United States" gave a lien in the case which the court might enforce.[42]

It has been held by the Supreme Court of the United States that the law applicable to a collision in territorial waters is the local law, not the "general maritime law" of the forum.[43] The intimation that the United States court could apply its idea of maritime law to the transaction, as against the local law, is therefore rather English [44] than American. But though the reason given by the court is not in accordance with our own precedents, the decision itself seems sound. The jurisdiction to act is unquestioned; a cause of action was no doubt created by the law of the place of collision; and if it pleases our courts, giving a remedy according to the foral procedure for a foreign cause of action, to apply to the cause of action its accustomed name of "maritime lien," no one can complain. If indeed the vessel had been sold since the collision it might have been necessary to revise the nomenclature.

II. The subject of the "jurisdiction over foreign corporation or individual doing business within a state" has received much attention during the past year. A brilliant book by Gerard Carl Henderson, Esq.,[45] brought the matter to the attention of lawyers; and in a recent article[46] Professor Scott has re-examined the subject. There seem to be three theories upon which a personal action

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[42] The Kongsli, 252 Fed. 267 (1918); comment in 32 HARV. L. REV. 574.

[43] Smith *v.* Condry, 1 How. (U. S.) 28 (1843).

[44] The Halley, L. R. 2 P. C. 193 (1868).

[45] THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW.

[46] "Jurisdiction over Nonresidents doing Business within a State," 32 HARV. L. REV. 871.

against a foreign corporation or an absent individual who has done business within a state may be rested.

First: The theory that such a corporation or individual is *found* where his agent regularly and in the course of business acts for him. This was the earliest theory developed to account for actions against a foreign corporation, and has several times been accepted by judges of the Supreme Court of the United States. That it is still active is shown by several late decisions based upon it.[47]

Second: That a foreign corporation may be allowed by statute to do business within the state only if it consents to be sued, and the doing business is the expression of such consent. This is therefore an instance of jurisdiction by consent. This consent has in course of time come pretty near to being fictitious; it is said to be *presumed;* but in theory the consent of the corporation is by the prevailing view today regarded as the basis of jurisdiction.[48]

Third: A theory has lately been suggested by Judge Learned Hand,[49] which may be formulated as follows: By causing a particular act to be done within a state, the corporation submits the act to the provisions of the state law with respect to liabilities growing out of the act. One such liability may (if so provided by statute) be the obligation to submit all litigation growing out of the act to the courts of the state.[50]

There can be no doubt that the first theory is contrary to the principles of law, and in particular to the doctrine that a corporation, being a mere creature of law, cannot exist, as such, outside the state of charter. If indeed we follow Mr. Henderson in his desire to assimilate our corporation to the European "Society," and allow it to stand in justice as a natural associated person, irrespective of incorporation, the difficulty would disappear (though no one has yet reckoned up the other difficulties which might be created); but until we are allowed to deal with a partnership as an existing entity, it seems that the benefits of this theory are barred to us. The second theory, that of consent to jurisdiction expressed

[47] Golden *v.* Connersville Wheel Co., 252 Fed. 904 (1918); Empire Fuel Co. *v.* Lyons, 257 Fed. 890 (1919).

[48] Flinn *v.* Western M. L. Assoc., 171 N. W. (Ia.) 711 (1919); Citizens' Nat. Bank *v.* Consolidated Glass Co., 97 S. E. (W. Va.) 689 (1919).

[49] Smolik *v.* Philadelphia & R. C. Co., 222 Fed. 148 (1915).

[50] These theories are expounded by Henderson, *op. cit.*, 77–100; Scott, *op. cit.*, 879–884.

by action, must still be regarded as the orthodox theory, though many late decisions are no doubt difficult to reconcile with it. Judge Hand's theory of forced submission to jurisdiction may ultimately prevail; but hitherto the jurisdiction of a court over foreigners has been jealously guarded, and it has been expressly held that the fact that an act has been done within a state does not give that state jurisdiction to render a judgment against the absent doer of the act.[51]

III. This being the confused state of the authorities as to corporations, what is the power of a state to exercise jurisdiction over an absent individual who has carried on business within the state? On this point there seems to be no difference of opinion in the decisions. The matter has been authoritatively settled by the Supreme Court of the United States in *Flexner* v. *Farson*.[52] In that case it appeared that a partnership containing Illinois partners was doing business in Kentucky through a resident partner. A Kentucky statute authorized service against absent partners who had done business in the state, by serving on the resident agent. A suit had been brought against the partnership in Kentucky, service made as directed in the statute, and judgment rendered. Suit was brought on the judgment in Illinois and the courts in that state refused to recognize the judgment. On appeal to the Supreme Court of the United States the court upheld the Illinois action.[53] The decisions allowing action against foreign corporations were urged as authorities; but Mr. Justice Holmes said:

"The consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. . . . The State had no power to exclude the defendants, and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void."

This decision is criticized, and an attempt made to limit its operation, by Professor Scott,[54] who appears to accept Judge Hand's theory of jurisdiction over corporations. And indeed upon that

[51] Sirdar Gurdyal Singh *v.* Rajah of Faridkote, [1894] A. C. 670.

[52] 248 U. S. 289, 39 Sup. Ct. Rep. 97 (1919).

[53] A similar decision was reached in Knox *v.* Wagner, 209 S. W. (Tenn.) 638 (1919).

[54] *Op. cit.* 884–891.

theory there can be no just basis for a distinction between corporations and individuals doing business within the state. It seems that the only theory upon which a distinction may be made is the theory of consent, upon which Mr. Justice Holmes' opinion is based.[55]

IV. The subject of "Jurisdiction to Annul a Marriage" has been illuminated by an article by Professor Herbert F. Goodrich.[56] He finds an irreconcilable conflict in the decisions, both English and American, and makes the interesting suggestion that "nullity of marriage" be abolished, and that all actions to free parties from a marriage, actual or alleged, be actions for divorce.

Theoretically, the law that created the marriage should alone have power to declare effectively and *in rem* that it never existed. Practically the courts are confused in the matter. In *Bays* v. *Bays*,[57] where New York parties had been married in Pennsylvania, the court avoided the difficulty:

"The plaintiff has resorted to the courts of this state to determine his rights, and I shall hold that under the laws of this state he has contracted a valid marriage."

V. The jurisdiction to grant judicial separation is quite distinct from jurisdiction either to divorce or to annul. That residence of the applicant is enough, domicil not being necessary, was held in *Armytage* v. *Armytage*,[58] where also custody of children was awarded. In that case the respondent also resided in England, though his domicil was abroad. The decision was followed in *Anghinelli* v. *Anghinelli*.[59] In this case it was objected that only the domiciliary court could affect a man's status; but the court replied that a judicial separation does not affect the marital status in any way.

In *Wilder* v. *Wilder*[60] the court took jurisdiction of a suit for judicial separation and custody of the children though the respond-

[55] It is true that Professor Scott points out that while an individual may not be excluded from the state, his actions within the state can be regulated by the state; and that there is no essential difference in this respect between a corporation and an individual. This is true; but it seems important only upon Judge Hand's theory.

[56] 32 HARV. L. REV. 806.

[57] 105 N. Y. Misc. 492, 174 N. Y. Supp. 212 (1918).

[58] [1898] P. 178.

[59] [1918] P. 247.

[60] 106 Atl. (Vt.) 562 (1919).

ent was a nonresident not served with process. This decision seems a sound one. The court should certainly not hesitate to protect a wife against marital aggression simply because it cannot reach the husband. Yet one is led to ask, What is the nature of the jurisdiction? It cannot be *in rem*, because it does not affect the marital status; if process against the husband is unnecessary, it cannot be *in personam*. It is submitted that the jurisdiction is not judicial at all; that the court is in such a case exercising an executive function, that of protecting the woman and preserving her from a breach of the peace. In this aspect the jurisdiction is the same as the jurisdiction of Chancery to adjudge a person insane and appoint a guardian; an exercise of executive power delegated by the king for the protection of his subjects. A court exercising this jurisdiction may appoint a guardian for a nonresident insane person.[61]

STATUS

I. The question whether marriage could take place when the parties were not in the presence of one another became a very important one during the late war. There were many American soldiers in France who desired to marry women they had left behind in America. The government received various opinions from eminent counsel. One example of such marriage, marriage by proxy, was legal in the Middle Ages; it had been expressly abolished in France, but never in England or America. Professor Lorenzen, in a learned and convincing article,[62] argued in favor of its possibility under American law. During the year was decided a case of alleged marriage, where the man in Minnesota framed a written agreement that the parties should thenceforth be married, and mailed it to the woman in Missouri, who signed the agreement and mailed it back. Neither state required any particular form or ceremony for marriage. The court held that the parties were married in Missouri, where the contract was completed by acceptance.[63]

This decision seems eminently sound. In most states neither a particular ceremony nor the declaration of clergyman or magistrate is needed to create a marriage. If such ceremony is required,

[61] Bliss *v.* Bliss, 104 Atl. (Md.) 467 (1918).

[62] 32 HARV. L. REV. 473.

[63] Great Northern Ry. *v.* Johnson, 254 Fed. 683 (1918); for comment see 32 HARV. L. REV. 848.

of course an absent party cannot be married — unless, indeed, he is represented by a proxy. But if no required ceremony demands the presence of both parties, there is no reason for supposing that the medieval doctrine permitting marriage between absent parties does not still prevail.

II. A confusion between a status and the legal incidents of a status is common, and two recent cases seem to illustrate it.

In *Coldingham Parish Council* v. *Smith* [64] the father of a Scotch adult lived in England; the son became a pauper. The Scotch poor law makes the parent of an adult pauper liable for his support, but he is not so liable under the English law. The court held that the English father was not bound to support the Scotch pauper, on the ground that "the liability of a father to maintain his son must be determined by the law of the father's domicil."

In *Paquin* v. *Westervelt* [65] a husband domiciled in Connecticut was sued by an English corporation for necessaries supplied in London to the wife. The Connecticut law made the husband liable for all goods furnished for the support of any member of his family. The court held this husband liable. The line of argument was that the relation of the parties created a status; that one of the incidents of the status is this obligation of the husband; that if the law did not apply to the transaction in London it would "shift the incidents of the marriage status according to the accident of locality, while the parties all the time remained residents of this state."

These cases seem to the author to be correctly decided, but quite on the wrong ground. Both are cases of alimentation, the Connecticut case being an obligation to support recognized by the common law, the English case a statutory obligation. It is submitted that such an obligation is based upon a local policy looking to the support of helpless persons, and must be created by the law of the place where the support is needed, that is, the place where the dependent resides for the time being. It is not true, in our law, that the domiciliary law creates both status and incidents of the status; the law of the domicil creates the static right, but the enjoyment of this right depends upon the law of the place where the party to the status desires to enjoy it.[66] Upon this principle

[64] [1918] 2 K. B. 90.

[65] 106 Atl. (Conn.) 766 (1919).

[66] Polydore *v.* Prince, Ware (U. S.) 402 (1837). See this matter discussed more at large in my TREATISE ON THE CONFLICT OF LAWS, Part I, 182, 183.

the law of Scotland and of England in the English and Connecticut cases would create the rights respectively. Such a right as that to recover against the husband for goods sold to the wife is a common-law right, and would be regarded in Connecticut as an ordinary compensatory cause of action; suit would therefore be allowed upon it, though the right arose in England. In the English case, however, the statutory obligation of alimentation is not enforceable outside the state that creates it; just as enforcement in another state is refused in the case of a filiation order in bastardy,[67] or of an order, under the French statute, that a father-in-law contribute to the support of his son-in-law.[68] Furthermore, the English father not being subject to the jurisdiction of the Scotch law, it could not exterritorially impose an obligation upon him.[69] For both reasons the English court was right in refusing recovery.

PROPERTY

I. In *Willys-Overland Co.* v. *Chapman* [70] it appeared that the claimant company had leased an automobile in California; the lease called for periodic payments and provided that if all terms were performed the lessee could buy the car for five dollars at the expiration of the lease. The court properly held this to be in fact a conditional sale. No record of the sale was made, but the law of California did not require a record. The lessee took the car to Texas and there sold it for value without notice. The court held that since the lease had not been recorded under the Texan law the sale in Texas passed an indefeasible title. The court agreed that the generally accepted doctrine was otherwise, but found the law of Texas to be settled in this way.[71]

In *Willys-Overland Co.* v. *Evans* [72] an automobile was purchased in Missouri, and a chattel mortgage taken back and recorded, then the car was taken to a garage in Kansas for repairs. The workman claimed a lien under the Kansan law, and this claim was allowed. The court did not deny the binding effect of the chattel mortgage,

[67] Graham *v.* Monsergh, 22 Vt. 543 (1850).

[68] De Brimont *v.* Penniman, 10 Blatch. (U. S.) 436 (1873).

[69] Rose *v.* Himely, 4 Cranch (U. S.) 241, 279, per Marshall, C. J.

[70] 206 S. W. (Texas Civ. App.) 978 (1918).

[71] See to the same effect Chambers *v.* Consolidated Garage Co., 210 S. W. (Texas Civ. App.) 565 (1919).

[72] 180 Pac. (Kan.) 235 (1919).

but held that under the law of Kansas the lien had priority over all other interests in the car.

This is a neat example of the settled principles involved. The car when brought into Kansas came with its title preserved as it had been in Missouri; Kansas did not and should not attempt to alter the title. But when an interest-affecting act, like work on the car, happened in Kansas, the law of Kansas had power to affect the title in any way thereby, and thus to create a new legal interest in the car.

II. The question, what law determines the valid exercise of a power, is one of great difficulty, on which the authorities are not in accord. Especially the question whether a will disposing of the residue shall be taken as an exercise of a power to appoint by will has led to much discussion. In *Sewall* v. *Wilmer* [73] the Massachusetts court held that the question is one of interpreting the intention of the donor, and is therefore to be governed by the legal meaning of the term at his domicil. The case has been severely criticized,[74] but it has been often followed.[75] In a recent case the Supreme Court of Rhode Island has applied it to interesting facts.[76] A power to appoint by will was created by a settlement made while the settlor was domiciled in Massachusetts; he afterwards became domiciled in Rhode Island. The donee made a will in which he did not mention the power; but the will contained a residuary clause which according to the Massachusetts law constituted an appointment. The court held that an appointment had been made.

In an English case, *In re Lewal's Settlement Trusts*,[77] the same result was reached. In an English settlement a power to appoint by will was given to a Frenchwoman. The woman died married, and under age, leaving a will by which her husband was made universal legatee. By the French law she was incapable, because of her youth, of passing by will more than one half her estate. The court held that as to the half which she could pass the appointment was governed by the English act, which provided that a residuary

[73] 132 Mass. 131 (1882).

[74] STORY, CONFLICT OF LAWS, 8 ed., 552; Professor Gray also criticized the case in in his lectures on Powers.

[75] Lane *v.* Lane, 4 Pennew. (Del.) 368, 55 Atl. 184 (1903). *In re* New York L. & T. Co., 209 N. Y. 585, 103 N. E. 315 (1913); Cotting *v.* De Sartiges, 17 R. I. 668, 24 Atl. 530 (1892); Farnum *v.* Pennsylvania Co., 87 N. J. Eq. 108, 99 Atl. 145 (1916).

[76] Harlow *v.* Duryea, 107 Atl. (R. I.) 98 (1919). [77] [1918] 2 Ch. 391.

clause should be an exercise of the power of appointment; as to the other half, the power remained unexercised. Peterson, J., said that the statutory provision

"amounted to a provision that every general power of appointment by will should be read as a power to appoint by a will which referred to the power or to the property subject to the power, or disposed of the personal estate of the appointer in general words."

In other words, it is a question of interpreting the word "appoint" according to the meaning it has at the settlor's domicil. The English authority has been quite unsettled on this point. This decision seems likely to bring it into accord with the Massachusetts doctrine.

III. A question of the interpretation of an ordinary written instrument is a very difficult one. In *Curtis* v. *Curtis*[78] a trust settlement had provided for payment to the beneficiary of such part of the income as the trustees should think proper should be paid to the beneficiary; and at her death the remainder should pass to the settlors. The question was, whether that part of the income which had not been paid over belonged to the beneficiary or to the settlors. One of the settlors was domiciled in New Jersey at the time of the settlement, the other in New York. The court said that if both had been domiciled in New Jersey the law of that state must have furnished the rule for the interpretation; but as one was from New York, the further facts that the situs of the property, the residence of the beneficiary, and the residence of the eventual trustees were all in New York, caused the New York law to prevail in the interpretation.[79]

IV. Mention must be made of a notable article by Professor Barbour on "The Extra-Territorial Effect of the Equitable Decree."[80]

Inheritance

I. Whether a will calls for election between its provisions and the general law of inheritance is a question that can be solved in at least three ways. In *Staigg* v. *Atkinson*[81] it was treated as probably a question involving the meaning of the will, to be settled therefore according to the law of the testator's domicil at the time he made the will. Two recent cases have adopted respectively the other two

[78] 184 N. Y. App. Div. 274, 173 N. Y. Supp. 103 (1918).
[79] Comment on this case may be found in 32 Harv. L. Rev. 729.
[80] 17 Mich. L. Rev. 527.
[81] 144 Mass. 564, 12 N. E. 354 (1887).

solutions. *In re Ogilvie* [82] involved a devise of Paraguayan land to charity by an English testatrix. By the Paraguayan law only one-fifth could be devised away from her next of kin, who had been otherwise provided for in the will. The court said that by the settled English law the next of kin were put to their election; the land was theirs unless they declined to take it, but if they did not, English law would refuse to give effect to the provisions of the will.

In *Perry* v. *Wilson* [83] the question was whether the widow of an Oklahoma man, who had made her a legatee in his will, could claim dower in Kentucky land; the Oklahoma law did not put her to her election, the Kentucky law did. It was urged that the question was one of the intention of the testator; but the court held her bound to elect under the Kentucky law. It is "only by virtue of the laws of this state," the court said,

"that a widow of an owner of land in this state, who dies a citizen and resident of another state, is entitled to dower in such lands; and, under such circumstances, she should only have dower in lands situated in this state, under the terms and conditions prescribed by the laws of this state."

This confusion of authority is caused by the fact, clearly brought out in these cases, that either the law of the land or of the legacy may withhold its property, irrespective of the provisions of the other law; or in both states the matter may be left to the intention of the testator. We must therefore look for a continuance of such apparent contradiction in the cases.

II. Doctrines of equitable conversion frequently complicate the question, what law governs a legacy. *In re Lyne's Settlement Trusts* [84] presented such a difficulty. An Englishwoman while in France made a holograph will, valid in France, and therefore by Lord Kingsdown's Act valid in England as to personalty, though not as to land. In this will she disposed of her reversion after her father's death in a marriage settlement of personal property in the hands of English trustees. By the settlement the trustees had full right to invest in land, and had power to sell such land at discretion, subject to the consent of the father during his life. It was held that the disposition was a valid one; that the entire trust must be treated

[82] [1918] 1 Ch. 492.
[83] 183 Ky. 155, 208 S. W. 776 (1919).
[84] [1919] 1 Ch. 80.

as personalty, though the land while in the hands of the trustees was immovable.

In *Norris* v. *Loyd* [85] the will of a Californian had devised Iowa land to his executor, to sell it and divide the proceeds between his children. At the request of the children, the executor conveyed the land to them. A California court held this reconversion invalid, and decreed a disposition of the land as personalty. The Iowa court, however, neglecting the California decision on the authority of the case of *Clarke* v. *Clarke*, held that the land remained such until and unless sold, and made a decree according to the law of Iowa.

Both decisions seem sound. The validity and effect of the will in the Iowa case depend upon the subject of its operation, which here was land; while in the English case the subject of the legacy was the entire estate, a movable estate in its creation, and not some particular investment which formed part of it, and it was therefore properly held to fall within the provisions of Lord Kingsdown's Act.

The Administration of Assets

I. In *Campbell* v. *Tousey* [86] the old Supreme Court of New York held that action could be brought in New York against a foreign executor who was found there. Though opposed to the great weight of authority, this doctrine has been embodied in the Code of Civil Procedure.[87] Relying upon this provision, certain creditors of one Gates, deceased, brought in New York a suit against a foreign executor to reach assets of the estate in New York, there being no administrator in that state. The suit was first brought in a federal court, and was dismissed by Judge Learned Hand for lack of jurisdiction, notwithstanding the Code.[88] The creditors thereupon instituted a similar suit in the state courts. In the Supreme Court, Special Term, Judge Bijur allowed the bill to lie,[89] and this judgment was affirmed in the Appellate Division.[90] The principal argument against the jurisdiction appears to have been the difficulty of enforcing any judgment that might be rendered for the plaintiff.

[85] 168 N. W. (Ia.) 556 (1918).
[86] 7 Cow. (N. Y.) 64 (1827).
[87] N. Y. Co. Civ. Proc. § 1836a.
[88] Thorburn *v.* Gates, 225 Fed. 613 (1915); 230 Fed. 922 (1916).
[89] Thorburn *v.* Gates, 103 N. Y. Misc. 292, 171 N. Y. Supp. 198 (1918).
[90] Thorburn *v.* Gates, 184 N. Y. App. Div. 443, 171 N. Y. Supp. 568 (1918).

It is submitted that the view usually held is based upon a much more fundamental reason than mere expedience. The court in this case is attempting to impose an obligation owed by the deceased upon another person, his executor. Such an imposition could be made only by a sovereign having power over the executor; and then only in connection with some act done under the sovereign's jurisdiction, since an arbitrary imposition of obligation would be impossible in our system of government. By taking upon him the administration of the estate in Pennsylvania, the executor undertook the obligation there imposed, which was to pay out of the estate there taken; an obligation for which he is responsible to the probate court of that state, the Orphan's Court, by which his nomination was confirmed. The law of New York is powerless to impose an obligation to pay in New York, for he has taken no estate in New York; it has no right to allow suit on the Pennsylvania obligation, since that obligation is to pay debts proved in Pennsylvania.

On one ground, however, New York might allow relief in this case. If there are assets in New York belonging to the deceased, the natural way of administering them is by the appointment of an administrator there. If, however, the Code of Procedure provides another way of reaching them, based on jurisdiction of them *in rem*, the proceeding is legal provided reasonable steps are taken to protect the interests of all concerned. The service of process on a foreign executor might be a reasonable method to secure these interests; though a personal judgment against the foreign executor would be impossible. It is to be noted, however, that goods brought into the state by the foreign executor could not be so reached, since they have become his own property; he holds them subject to the courts of his own state, but is not accountable for them to the courts of New York.[91]

II. In *Ames* v. *Citizens Bank* [92] a resident of New Mexico died, and his administrator, there appointed, found there a certificate of deposit for a certain amount in a Kansas bank. He came to Kansas and demanded payment; an administrator appointed in Kansas also claimed the money. The court held that payment

[91] Currie *v.* Bircham, 1 Dow. & Ry. 35 (1822).
[92] 181 Pac. (Kan.) 564 (1919).

should be made to the New Mexican administrator. There was no indebtedness of the estate in Kansas.

The syllabus, prepared by the court, lays stress on the fact that the New Mexican administration was the principal one, and the Kansan only ancillary. The opinion, however, proceeds chiefly on the ground that the certificate of deposit is a specialty, and therefore assets where found. It is submitted that in writing the opinion the judge was Philip sober.

III. The subject of the widow's allowance has proved a puzzling one whenever an interstate application of the law is in question. In *O'Hara* v. *O'Hara* [93] the widow at the time of the husband's death was domiciled in the state, but she had since become nonresident. The court held that the right to the allowance vested at the moment of her husband's death, and allowed recovery. *In re Lavenberg's Estate* [94] presented a case where the widow was nonresident at the husband's death; the spouses were not separated, but lived apart for his business convenience. The court granted the allowance. In this case, however, it seems clear that the wife's domicil was with her husband; and as between the two the allowance should be based upon domicil. A *dictum* in the case that the statute confers a right, no matter what the domicil of the widow, seems questionable. It is usually held that the allowance is "a humane and beneficent public policy" to keep the widow and family from want; [95] and this policy concerns the domicil alone.

Contracts

I. In *Kuhnhold* v. *Compagnie Générale Transatlantique* [96] there was a provision in a bill of lading on a shipment from France that all litigation arising out of the execution of the bill of lading should be adjudged according to the French law and in a designated French court which, the bill declared, was accepted by the parties. The court held that this agreement did not oust the American courts.

This case may perhaps be distinguished from a case like *Hamlyn* v. *Talisker Distillery*, [97] where the provision was that no action

[93] 182 Ky. 260, 206 S. W. 462 (1918).
[94] 177 Pac. (Wash.) 328 (1918).
[95] Smith *v.* Howard, 86 Me. 203, 29 Atl. 1008 (1894).
[96] 251 Fed. 387 (1918).
[97] [1894] A. C. 202.

should be brought for any dispute arising upon the contract until it had been submitted to arbitration in a certain way. It might be taken that the submission to arbitration is a term of performance rather than a regulation of remedy, and that there was no breach of contract until the arbitration was refused or the award unperformed. The case of *Mittenthal* v. *Mascagni*,[98] however, is on all fours with the recent case; and it was there held that the American courts were ousted of jurisdiction. In view of the paucity of authorities such a conflict of decision leaves the law most uncertain.

II. Professor Lorenzen has published during the year a remarkably full and thorough study of "The Conflict of Laws Relating to Bills and Notes." [99] In this book the author examines the rules for solving conflicts in this topic in almost every civilized country. While the scope of his work does not call for new discoveries or inventions, the careful statement of so many rules of so many laws is of wonderful assistance to the student, and is indispensable for a lawyer who is handling European or Spanish-American commercial paper.

TORTS

Most of the new law in torts concerns in some way the Workmen's Compensation Act. The earlier tendency in these cases was to hold the act territorial, applying to all accidents within the state and to none outside.[100] This view still gains new adherents.[101] But the view that the provisions of the act enter into the contract of hiring, and, no matter where the accident takes place, the workman may recover in the state where the contract was made, is gaining ground and seems on the whole likely to prevail.[102] Whatever the interpretation in this respect, it is clear that, in view of the special procedure called for in the cases, suit can be brought only in the courts of the state whose statute creates the right.[103]

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[98] 183 Mass. 19, 66 N. E. 425 (1903).

[99] New Haven: Yale University Press, 1919. For a review of this work see 32 HARV. L. REV. 983.

[100] *In re* Gould, 215 Mass. 480, 102 N. E. 693 (1913).

[101] Union B. & C. Co. *v.* Industrial Commission, 287 Ill. 396, 122 N. E. 609 (1919).

[102] Pierce *v.* Bekins V. & S. Co., 172 N. W. (Ia.) 191 (1919); State *v.* District Court, 140 Minn. 427, 168 N. W. 177 (1918).

[103] Martin *v.* Kennecott Copper Corp., 252 Fed. 207 (1918); Thompson *v.* Foundation Co. (N. Y. App. Div.) 177 N. Y. Supp. 58 (1919).